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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

RODNEY MICHAEL CROSS,

Defendant and Appellant.

E070662

(Super.Ct.No. RIF1603987)

OPINION

APPEAL from the Superior Court of Riverside County. Bambi J. Moyer, Judge.

Affirmed in part, reversed in part, and remanded with directions.

David Zarmi, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Michael Pulos and Teresa Torreblanca, Deputy Attorneys General, for Plaintiff and Respondent.

I

INTRODUCTION

Pursuant to a plea agreement, defendant and appellant Rodney Michael Cross pleaded guilty to possession for sale of a controlled substance, to wit, methamphetamine (Health & Saf. Code¹, § 11378). Defendant also admitted that he had suffered four prior convictions for possession for sale of a controlled substance within the meaning of Health and Safety Code section 11370.2, subdivision (c), and two prior prison terms within the meaning of Penal Code section 667.5, subdivision (b). In return, the remaining charges and enhancement allegations were dismissed, and defendant was sentenced to a total split term of 17 years in county jail with credit for time served.

Defendant's sole contention on appeal is that his four prior convictions for possession for sale of a controlled substance no longer constitute qualifying convictions under section 11370.2, subdivision (c), due to a change in the law that applies retroactively to him under *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*). Therefore, he argues, his sentence should be modified to strike the 12 years he received for those prior convictions. The People concede that in light of the recent amendments to section 11370.2, all three-year enhancements imposed under that statute must be stricken. We agree and reverse the sentence and remand the matter to the trial court for resentencing with directions to strike the four three-year enhancements imposed pursuant

¹ All future statutory references are to the Health and Safety Code unless otherwise stated.

to section 11370.2. (See *People v. Millan* (2018) 20 Cal.App.5th 450, 454-456 (*Millan*); *People v. Zabala* (2018) 19 Cal.App.5th 335, 338 (*Zabala*).) On remand, the trial court may reconsider the entire sentence. The judgment otherwise is affirmed.

II

FACTUAL AND PROCEDURAL BACKGROUND²

On August 12, 2016, defendant possessed methamphetamine for sale in the county of Riverside.

On April 5, 2017, the Riverside County District Attorney's office filed an information charging defendant with possession for sale of methamphetamine (§ 11378; count 1); transportation of methamphetamine (§ 11379, subd. (a); count 2); and misdemeanor identity theft (Pen. Code, § 530.5, subd. (c)(1); count 3). The information also alleged as to counts 1 and 2 that defendant had suffered four prior convictions for possession for sale of a controlled substance (§§ 11370.2, subd. (c), 11378). The information further alleged that defendant had served eight prior prison terms (Pen. Code, § 667.5, subd. (b)).

On August 11, 2017, pursuant to a negotiated disposition, defendant pleaded guilty to possession for sale of methamphetamine (count 1) and admitted the four prior possession for sales convictions attached to count 1. Defendant also admitted two of the eight prior prison term allegations contained in the information. In return, defendant was

² Because the factual background is not relevant to the limited issue raised by defendant in this appeal, we will not recount those details with specificity.

promised that the remaining counts and enhancement allegations would be dismissed, and he would be sentenced to a total stipulated, split term in county jail.

On September 1, 2017, defendant was sentenced in accordance with his plea agreement as follows: a 17-year split sentence consisting of seven years in jail followed by 10 years of mandatory supervision on various terms and conditions of supervision. The sentence consisted of the upper term of three years for the substantive offense (count 1), plus 12 years (three years each) for the four prior possession for sales convictions and two years (one year each) for the two prior prison terms. Defendant was awarded 340 days of credit for time served and the remaining counts and enhancement allegations were dismissed.

Defendant filed a notice of appeal one day late and did not obtain a certificate of probable cause. On June 11, 2018, this court granted defendant's habeas corpus petition and deemed that his notice of appeal was constructively filed within the requisite 60-day period.

III

DISCUSSION

At the time of defendant's plea and sentencing, section 11370.2, subdivision (c), required the trial court to impose on any person convicted of a violation of section 11378 "a full, separate, and consecutive three-year term for each prior felony conviction." (Former § 11370.2, subd. (c).) Because defendant's four prior possession for sale

convictions fell within this statute, the court properly imposed four consecutive three-year sentence enhancements.

Defendant argues that his sentence must be modified to strike the 12 years he received for the four prior possession for sale convictions because those prior convictions are no longer qualifying convictions under amended section 11370.2, subdivision (c), effective January 1, 2018. Defendant also asserts that the amendments to section 11370.2, subdivision (c), apply retroactively under *Estrada, supra*, 63 Cal.2d 740 as his case was not yet final. The People concede that amended section 11370.2 retroactively applies to defendant, and therefore this court should strike the four prior drug sales convictions and modify the judgment accordingly. We concur.³

After defendant's plea and sentence, on October 11, 2017, the Governor signed Senate Bill No. 180 (Stats. 2017, ch. 677, § 1, eff. Jan. 1, 2018), which amended section 11370.2, subdivision (c), to eliminate all but one of the qualifying convictions for imposition of the three-year sentencing enhancement. Thus, as amended, section 11370.2 allows imposition of the enhancement only if the defendant has a prior conviction for using or inducing a minor to act as an agent in the commission of a drug offense in violation of section 11380. (Stats. 2017, ch. 677, § 1; *Millan, supra*, 20 Cal.App.5th at pp. 454-455.) Hence, violations of section 11378 for possession of a controlled substance for sale are among the convictions that no longer serve to qualify a defendant for an

³ We also agree with the parties that no certificate of probable cause was required to raise the instant claim on appeal. (*People v. Hurlic* (2018) 25 Cal.App.5th 50, 57-59 (*Hurlic*).)

enhancement under section 11370.2, subdivision (c). (See Stats. 2017, ch. 677, § 1.)

Here, it is undisputed that defendant's prior drug-related convictions were for violating section 11378, not for violating section 11380.

Furthermore, the amendment to section 11370.2, subdivision (c), lessens punishment for a person, such as defendant, whose case is not yet final on appeal and whose prior convictions no longer qualify for the three-year sentence enhancement. In *Millan, supra*, 20 Cal.App.5th 450, the court held that "the amendment to . . . section 11370.2, subdivision (c) lessens punishment for a person such as Millan whose prior convictions no longer qualify for the three-year . . . section 11370.2, subdivision (c) enhancement. Rather than being subjected to a three-year enhancement for each prior conviction, such persons are no longer subject to any enhanced punishment pursuant to the amended statute." (*Millan*, at pp. 455-456, italics omitted.) The court applied the limited exception to the ordinary rule that statutes apply prospectively set forth by the California Supreme Court in *Estrada, supra*, 63 Cal.2d at page 745, and reversed the defendant's sentence. (*Millan*, at pp. 455-456.)

Here, defendant and the People agree that Senate Bill No. 180 applies to all cases not yet final as of January 1, 2018, that the amendment to section 11370.2, subdivision (c), reduces punishment, and that the enhancement under section 11370.2, subdivision (c), no longer applies to defendant's prior convictions for violation of section 11378. The parties are correct. Defendant is currently appealing the sentence imposed on September 1, 2017, and the judgment of conviction in his case is therefore

not final. (*People v. Smith* (2015) 234 Cal.App.4th 1460, 1465 [“A judgment becomes final when the availability of an appeal and the time for filing a petition for certiorari [in the United States Supreme Court] have expired”].) Accordingly, because the amendment to section 11370.2, subdivision (c), reduces punishment, we agree with the parties it applies retroactively to nonfinal judgments such as this one. (*Millan, supra*, 20 Cal.App.5th at pp. 454-455; *Zabala, supra*, 19 Cal.App.5th at p. 344; *People v. Brown* (2012) 54 Cal.4th 314, 323-324; *People v. Francis* (1969) 71 Cal.2d 66, 75-76; *Estrada, supra*, 63 Cal.2d at p. 745.)

We also find that under *Harris v. Superior Court* (2016) 1 Cal.5th 984, the People are not entitled to withdraw from the underlying plea agreement and have the original charges reinstated based upon the amendment to the law. (*Id.* at pp 987, 992-993; see *Zabala, supra*, 19 Cal.App.5th at pp. 339-340, 344-345 [vacating the section 11370.2, subdivision (c) enhancement on appeal following a plea]; *Hurlic, supra*, 25 Cal.App.5th at pp. 57-59; *Doe v. Harris* (2013) 57 Cal.4th 64, 66.) Accordingly, on remand the trial court is directed to strike the four section 11370.2, subdivision (c) enhancements and to resentence defendant.

Because of the inherently integrated nature of a felony sentence, courts have long recognized that “[w]hen a case is remanded for resentencing by an appellate court, the trial court is entitled to consider the entire sentencing scheme. Not limited to merely striking illegal portions, the trial court may reconsider all sentencing choices. [Citations.] This rule is justified because an aggregate prison term is not a series of separate

independent terms, but one term made up of interdependent components. The invalidity of one component infects the entire scheme.” (*People v. Hill* (1986) 185 Cal.App.3d 831, 834 (*Hill*); *People v. Burbine* (2003) 106 Cal.App.4th 1250, 1258 (*Burbine*); see *People v. Castaneda* (1999) 75 Cal.App.4th 611, 613-614; *People v. Craig* (1998) 66 Cal.App.4th 1444, 1450-1452; *People v. Calderon* (1993) 20 Cal.App.4th 82, 88.) The section 11370.2 enhancements here were a component of the sentence that the trial court selected to obtain an aggregate split-term sentence. Without those enhancements, the trial court might have made different decisions with respect to other components of the sentence. We therefore leave it to the trial court to determine the appropriate sentence in light of all the relevant factors, including the changed legal landscape with respect to the section 11370.2 enhancements.

Accordingly, in striking the four three-year enhancements and resentencing defendant on remand, the trial court is entitled to reconsider the full range of sentencing options and impose a lawful sentence consistent with the court’s original and presumably unchanged sentencing goals. (*Hill, supra*, 185 Cal.App.3d at p. 834; *Burbine, supra*, 106 Cal.App.4th at p. 1258.)

IV

DISPOSITION

In light of the amendments to section 11370.2, subdivision (c), effective January 1, 2018, the sentencing order is reversed in part, and the matter is remanded to the trial court for resentencing to strike the four three-year enhancements imposed pursuant to

section 11370.2. On remand, the trial court may reconsider the entire sentence. The judgment is otherwise affirmed.

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CODRINGTON
J.

We concur:

RAMIREZ
P. J.

FIELDS
J.